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IN THE

Supreme Court of the United States

October Term, 1953

No. 687

347 U.S.
SEV-50
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SEVEN-UP WASHINGTON, INC.,
a corporation
THE DR. PEPPER BOTTLING CO.,
OF WASHINGTON, D. C., INC.,
a corporation
PEPSI-COLA BOTTLING COMPANY OF WASHINGTON,
a corporation
RALPH PFAN, T/A BARQ'S BOTTLING CO.
THE ROCK CREEK GINGER ALE CO., INC.,
a corporation

Petitioners

v.

DISTRICT OF COLUMBIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT, AND SUPPORTING BRIEF

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PEPSI-COLA BOTTLING COMPANY OF WASHINGTON, a corporation
RALPH PFAN, T/A BARQ'S BOTTLING CO.
THE ROCK CREEK GINGER ALE CO., INC., a corporation

Petitioners

v.

DISTRICT OF COLUMBIA

Respondent

PETITION OF SEVEN-UP WASHINGTON, INC., THE DR. PEPPER BOTTLING CO. OF WASHINGTON, D. C., INC., PEPSI-COLA BOTTLING COMPANY OF WASHINGTON, RALPH PFAN T/A BARQ'S BOTTLING CO. AND THE ROCK CREEK GINGER ALE CO., INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Seven-Up Washington, Inc., The Dr. Pepper Bottling Co., of Washington, D. C., Inc., Pepsi-

Cola Bottling Company of Washington, Ralph Pfan, t/a Barq's Bottling Co. and The Rock Creek Ginger Ale Co., Inc., respectfully pray that a writ of certiorari issue to review a decision of the United States Court of Appeals, District of Columbia Circuit, entered January 14, 1954, which affirmed in part and reversed in part companion decisions of the District of Columbia Tax Court entered December 11, 1952.

SUMMARY STATEMENT OF THE MATTER INVOLVED

A. The Proceedings Below

These proceedings arise out of petitions filed in the District of Columbia Tax Court appealing from compensating-use tax assessments levied by respondent on bottles, wooden cases and cardboard carriers bought new from without the District of Columbia by petitioners for distribution of their soft drink products, which, classified as food, are expressly exempt from tax. The District of Columbia Tax Court concluded that during the tax periods involved the petitioners purchased new from without the District of Columbia bottles, wooden cases and cardboard carriers for the purpose of resale in the same form as received and, therefore, the assessment of use taxes thereon was illegal.

The District of Columbia appealed the decisions of the District of Columbia Tax Court to the United States Court of Appeals, District of Columbia Circuit, which Court entered its decision on January 14, 1954, reversing the decisions of the Tax Court insofar as the assessment of use taxes on the bottles and wooden cases, holding the assessments of use taxes on cases and bottles to have been proper, and agreeing with the Tax Court that use taxes were erroneously assessed on the cardboard carriers.

B. The Facts of the Case

The Congress, in 1949, passed the District of Columbia Compensating-Use Tax Act, 63 Stat. 124 (sec. 47-2701, et seq., D. C. Code, 1951) in which bottled soft drinks are expressly classified as food and sales of which are exempt from taxes. The act defines sales as follows:

> "(a) 'Retail sale', 'sale at retail', and 'sold at retail' means all sales in any quantity or quantities of tangible personal property, whether made within or without the District, and services, to any person for the purpose of use, storage, or consumption, within the District, taxable under the terms of this chapter. *These terms shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, or to use or incorporate the property so transferred as a material or part of other tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining.*" (Emphasis supplied)

The United States Court of Appeals, District of Columbia Circuit, in its decision, summarized the undisputed findings of facts of the District of Columbia Tax Court.

The District of Columbia Tax Court had concluded from the facts that the petitioners *sold* the bottles, wooden cases and cardboard carriers to their customers in distribution of their soft drink products and that title thereto passed with no obligation to return the same and, also, that the bottles, cases and carriers were purchased new from without the District of Columbia for the purpose of resale in the same form as received and, therefore, under the provisions of the statute and regulations, the use taxes assessed were erroneous.

The United States Court of Appeals, District of Columbia Circuit, in its opiinon filed on January 14, 1954, held that the bottles and cases were purchased by the petitioners for the *dominant purpose* of *use* and, therefore, although conceding that sales actually occurred, held the assessments as to the bottles and cases proper; when considered with the language of the statute quoted above, this conclusion clearly increases the scope of the act to tax that which was not intended to be taxed.

It is to review the decision as to the assessment of use taxes on bottles and cases that the present Petition is filed.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254 (a). The opinion of the court below is included in the record certified to this Court at page 106.

At the present time there exists a conflict in decisions between an United States Circuit Court of Appeals and the highest court of a state and, again, between two of the highest state courts as to the interpretation of use tax statutes and their application to containers as employed in the bottling industry. The precise question has not heretofore been determined by this Court.

The District of Columbia Use Tax is similar to compensating-use tax statutes enacted by forty-three of the forty-eight states, and all are affected by the existing conflict of decisions.

The decision of the Court below is in direct conflict with that of the highest court of the State of Tennessee and, again, the decision of that court, in ruling on identical statutes, is in conflict with the decision of the highest court of the State of Florida. Due to the similarity of all such statutes, further confusion in opinions of other

higher state and Federal courts may reasonably be anticipated unless clarified by this Court.

The decision of the Court below is in direct conflict with those of the other Federal and state courts as to what is a "sale" or "resale" and what is a "use."

QUESTIONS PRESENTED

1. Under a state of undisputed facts, did the United States Court of Appeals, District of Columbia Circuit, usurp a legislative function by enlarging the language of a clear and unambiguous statute to make taxable that which was not taxable?

2. Did the United States Court of Appeals, District of Columbia Circuit, in applying the District of Columbia Use Tax Act to a state of undisputed facts, properly determine the "purpose" of the petitioners in acquiring bottles and wooden cases as predominantly for use and not resale, despite the fact that resale actually occurred?

3. Did the Court below, by virtue of its opinion, create a precedent for dual taxation where, in fact, legislatures intended no tax to apply, and open the door for further conflict in decisions of Federal and state courts?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI

1. The decision of the Court below is in conflict with a decision of the highest state court of Tennessee on the interpretation of similar statutes.

2. There now exists, in decisions of the highest state courts and between the highest state courts and the intermediate Federal courts, a conflict in decisions effecting a nation-wide industry, strongly suggesting the need for clarification by this Court.

3. The decision of the Court below is erroneous in literally rewriting an Act of Congress so as to enlarge its scope making taxable something which was clearly non-taxable.

4. The decision of the Court below is erroneous in reversing the ruling of the District of Columbia Tax Court that the bottles and wooden cases were purchased by petitioners for *resale* in the same form as received, and therefore not subject to use taxes.

5. The decision of the Court below is predicated on an unsound construction of a Congressional statute and if permitted to stand, will create further confusion in decisions of the highest state courts concerning application of the use tax acts to the bottling industry throughout the United States.

Respectfully submitted,

SEVEN-UP WASHINGTON, INC., THE DR. PEPPER BOTTLING CO., OF WASHINGTON, D. C., INC., PEPSI-COLA BOTTLING COMPANY OF WASHINGTON, RALPH PFAN, T/A BARQ'S BOTTLING CO. AND THE ROCK CREEK GINGER ALE CO., INC.

Petitioners

By WILLIAM E. FUREY

STEPHEN G. INGHAM
Attorneys

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v.

DISTRICT OF COLUMBIA

Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions of the District of Columbia Tax Court, filed on December 11, 1952, are not officially reported, but are included in the record certified to this Court, pages 13 et seq.

The opinion of the United States Court of Appeals, District of Columbia Circuit, was filed on January 14, 1954, and is also included in the record certified to this Court at page 106.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of Title 28, United States Code, Section 1254(a).

STATEMENT OF THE CASE

The petitioners are engaged in the business of manufacturing soft drink products and the sale and distribution thereof in the District of Columbia, Maryland and Virginia.

Under the provisions of the District of Columbia Use Tax Act, 63 Stat. 124, et seq. (47-2701.1(a) D. C. Code, 1951), soft drink beverages are classified as food and expressly exempt from tax, as is tangible personal property purchased from without the District of Columbia for the purpose of reselling the same in the form received. The respondent levied use tax assessments on the bottles, wooden cases and cardboard carriers purchased outside of the District of Columbia by the petitioners for the distribution of their soft drink products.

The petitioners appealed from the assessment of the use taxes to the District of Columbia Tax Court and that Court, upon undisputed facts, held that the bottles, cases and carriers were purchased by the petitioners for resale to their customers with the soft drinks, that title thereto passed and, under the provisions of the statute, were not subject to use taxes.

The United States Court of Appeals, District of Columbia Circuit, upon appeal by the respondent, agreed with the Tax Court that the assessment of use taxes on

the cardboard carriers was erroneous, but decided that the *dominant purpose* of the petitioners in purchasing bottles and cases was to use them, rather than to resell, although conceding that sales actually occurred, and the assessment of use taxes on them was proper.

Specification of Errors to be Urged

1. The decision of the court below erred in reversing the decision of the District of Columbia Tax Court as to the assessment of use taxes on bottles and cases.

2. The decision of the court below is in error since it is predicated on an unsound construction of an Act of Congress.

3. The decision of the court below is erroneous in that it extended the application of a tax statute to impose taxes beyond the scope of the statute.

4. The court below erred in determining that petitioners purchased the bottles and cases to use, rather than to resell, and the decision is in conflict with those of other Federal and highest state courts.

SUMMARY OF THE ARGUMENT

The court below, in the interpretation and application of a clear and unambiguous tax statute, extended the scope and import of an Act of Congress to impose use taxes on something not provided for in the statute.

The decision of the court below is in direct conflict with other Federal and highest state courts, which in turn have conflicting decisions.

ARGUMENT

I. The Court Below Extended the Scope of Tax Legislation.

The District of Columbia Use Tax Act, Section 201(a), provides:

> "'Retail sale', 'sale at retail', and 'sold at retail' means all sales in any quantity or quantities of tangible personal property, whether made within or without the District, and services to any person for the purpose of use, storage, or consumption, within the District, taxable under the terms of this chapter. These terms shall mean all sales of tangible personal property to any person for any purpose *other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, or to use or incorporate the property so transferred as a material or a part of other tangible property to be produced for sale by manufacturing, assembling, processing or refining.* * * *" (Emphasis supplied)

The facts here were undisputed and, briefly, are: Petitioners purchased new from manufacturers beyond the District bottles, cases and carriers in which to distribute their soft drink products; the unit of sale to their customers was one wooden case of twelve or twenty-four bottles, with or without the cardboard carriers, and the fluid contents at a fixed price. There was no agreement or obligation to return the bottles and cases to the petitioners; however, upon their being returned, the customers were credited or repaid at a fixed rate.

The court below virtually rewrote the provision of the statute above quoted by holding the bottles and cases were subject to tax. It said that the *dominate purpose* of petitioners was to *use* the bottles and cases and not to *resell* them. The language of the statute itself is clear and unambiguous and must control, as this Court held in

Caminetti v. United States, 242 U.S. 470, 37 S.Ct. 192, 61 L.ed. 442:

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, * * * the sole function of the courts is to enforce it according to the terms."

Also, *Hamilton v. Rathbone,* 175 U.S. 414, 44 L.ed. 219.

If the court below considered the statute ambiguous, the doubt should have been resolved in favor of the petitioners. In *Gould v. Gould,* 245 U.S. 151, 38 S.Ct. 53, 62 L.ed. 211, this Court stated the rule as follows:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen."

II. The Decision of the Court Below Does Not Find Support in the Authorities.

Sales and use taxes statutes have been enacted in forty-three states, and the decision of the court below vitally effects them since it is the highest Federal court to decide on the interpretation and application of such a statute on the question here presented.

Conflicting decisions now exist between the Federal courts and the highest state courts, and again, highest state courts differ in their decisions.

The court below found support for its decision in but two cases: *Gay v. Canada Dry Bottling Co. of Fla.,* —— Fla. ——, 59 So. 2d 788, and the unreported California case of *Owens-Illinois Pacific Coast Co. v. St. Bd. of Equalization,* 1 P-H. Cal. State & Local Tax Service,

sec. 23,001. The great weight of authorities, however, support the decision of the District of Columbia Tax Court.

Tennessee has a sales tax statute identical to that of Florida, but its court, in a more recent opinion, *Evans v. Memphis Dairy Exchange, Inc.*, 194 Tenn. 317, 250 S.W. 2d 547, came to a conclusion contrary to that of the court below and Florida's court. A United States District Court, in the case of *Canada Dry Bottling Co. of Florida v. Fahs,* U.S.D.C., S.D. Fla., 109 F.Supp. 187, in a case involving the same facts as the Florida state court, decided the transactions constituted sales, and made a tabulated comparison of a number of the Federal, Tax and state court decisions in support of its conclusion; these and other authorities, in varying proceedings, all support the decision of the District of Columbia Tax Court as against that of the court below.[1]

The decision of the court below, if permitted to stand, will create further conflict in opinions of the highest state courts; that confusion can be avoided by clarification from this Court.

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(1)

In re Allen, (D.C.E.D. Ark.) 183 Fed. 172
Dewey Portland Cement Co. v. Crooks, (C.C.A.) 57 F.2d 499
La Salle Portland Cement Co. v. Comm., (C.C.A.) 59 F.2d 361
Buck v. Commr., (C.C.A.) 83 F.2d 627
Goebel Brewing Co. v. Brown, 306 Mich. 222, 10 N.W. 2d 835
Consolidated Paper Co. v. Nims, 306 Mich 216, 10 N.W. 2d 833
Dept. of Treasury v. Fairmont Glass Works, 113 Ind. App. 684, 49 N.E. 2d 1
Iten Biscuit Co. v. Commr., 25 B.T.A. 870
Okonite Co. v. Commr., 155 F.2d 248
Ferguson v. Commr., 11 T.C.M. 213
People v. Cannon, 139 N.Y. 32, 34 N.E. 759
Commonwealth v. Brandon Farms Milk Co., 249 Mass. 531, 144 N.E. 381

CONCLUSION

It is respectfully submitted that the court below was in error in the construction and application of a Congressional tax statute vitally effecting the administration of similar state statutes and the construction thereof by state courts, urgently suggesting the need of a ruling from this Honorable Court clarifying the question to avoid future conflict of decisions between the Federal, Tax and courts of last resort of the states.

Respectfully submitted,

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WASHINGTON,
RALPH PFAN, T/A BARQ'S BOTTLING CO.,
THE ROCK CREEK GINGER ALE CO., INC.,
Petitioners,

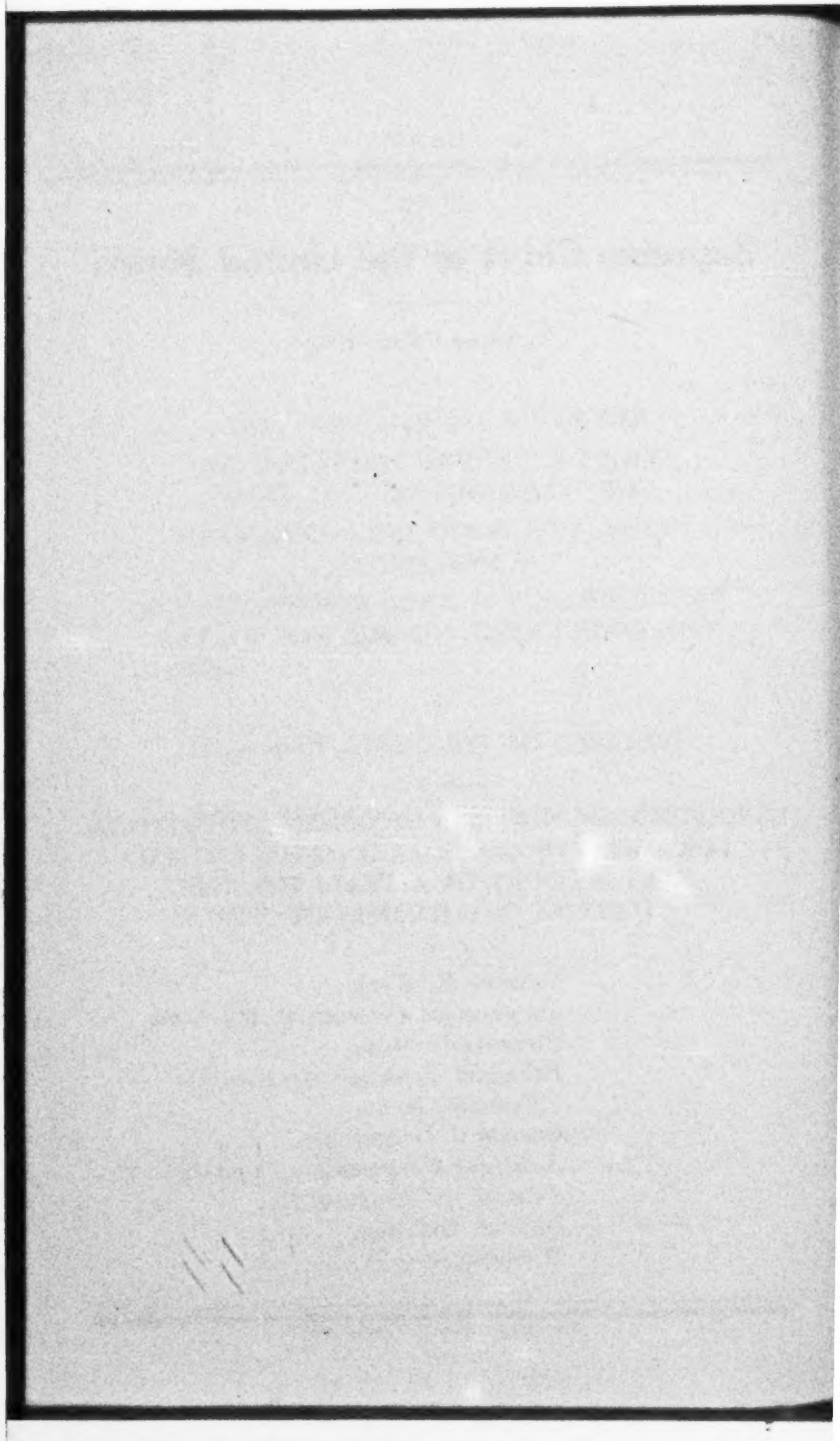
v.

DISTRICT OF COLUMBIA, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRINTING DIVISION—D. C. GOVERNMENT



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DISTRICT OF COLUMBIA, *Respondent.*

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OPINIONS BELOW

The opinions of the District of Columbia Tax Court (R. 14, 29, 44, 55, 73) are not reported. The opinion of the

United States Court of Appeals for the District of Columbia Circuit (R. 105-116) is not yet reported.

GROUNDS OF JURISDICTION

Although the petitioners have made a jurisdictional statement, apparently in compliance with Rule 38, par. 2, of this Court (Pet., p. 4; brief, p. 8), they have not stated the grounds on which the jurisdiction of this Court is invoked as required by Rule 27, par. 2(c), of the Rules of this Court.

These cases originated in the District of Columbia Tax Court.[1] In each case the only allegation of error assigned on appeal from assessment of District of Columbia use taxes was whether the "Inclusion of the purchase price of tangible personal property which the petitioner acquired to resell in the form in which the same was received by it; namely, bottles, shells,[2] and containers" was within the purview of the District of Columbia Use Tax Act, 63 Stat. 124, ch. 146 (Sec. 47-2701, et seq., D. C. Code, 1951). (R. 1, 17, 31, 49, 57.) This Court is authorized to review decisions of the District of Columbia Tax Court under the provisions of Sec. 47-2404, D. C. Code, 1951 (52 Stat. 371) as amended by Sec. 3(b) of the Act of July 10, 1952, 66 Stat. 543, ch. 649.

STATUTES INVOLVED

The statute involved is the District of Columbia Use Tax Act, *supra*, the material portions of which are as follows:

Sec. 212 (63 Stat. 126; Sec. 47-2702, D. C. Code, 1951) imposes the tax:

> "Sec. 212. Beginning on * * * there is hereby imposed and there shall be paid by every vendor engaging in business in the District and by every

[1] Formerly known as the Board of Tax Appeals for the District of Columbia (R. 110).

[2] Otherwise known as "wooden cases."

purchaser a tax on the use, storage, or consumption of any tangible personal property and services sold or purchased at retail sale. * * *"

Sec. 201 (63 Stat. 124; Sec. 47-2701, par. 1, D. C. Code, 1951) defines "retail sale":

> "Section 201. (a) 'Retail sale', 'sale at retail', and 'sold at retail' means all sales in any quantity or quantities of tangible personal property, whether made within or without the District, taxable under the terms of this title. These terms shall mean all sales of tangible personal property to any person for any purpose other than those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received by him, * * *."

Sec. 206 (63 Stat. 124; Sec. 47-2701, par. 6, D. C. Code, 1951) defines "use" as follows:

> "Sec. 206. 'Use' means the exercise by any person within the District of any right or power over tangible personal property and services sold at retail, whether purchased within or without the District by a purchaser from a vendor."

STATEMENT OF THE CASE

There is no dispute about the facts (R. 107, 109). Briefly they are:

Petitioners engaged in the District of Columbia in the manufacture, bottling, and sale of soft drinks. They sell and distribute the drinks in carboard cartons and wooden cases to grocers and other distributors who in turn sell them to the ultimate consumers. (The cardboard cartons are not herein involved.)

The total cost of each wooden case and the 24 empty bottles it was designed to contain varied from $1.79 to $2.23. A case of bottled drinks was sold by petitioners to their customers at prices varying from $1.30 to $1.56, covering the fluid contents, bottles, case, and, if any, cartons. There was no agreement between petitioners and their customers for return or repurchase of the containers; nevertheless, it was understood petitioners would pay or give credit of 2 cents for each empty case and each empty bottle, making a total of 50 cents for a case of 24 empty bottles. Unless the empty bottles and cases were returned in large numbers petitioners could not have remained in business, since the amounts they paid for the containers new were considerably more than they received for them when filled. The economic life of each petitioner thus depended upon a continuous reuse of a large number of the same bottles and cases. (R. 107, 108.)

Petitioners were assessed use taxes on the amounts paid by them for bottles and wooden cases used in their soft drink businesses (R. 12, 106). The Tax Court, however, concluded that the bottles and wooden cases purchased new and those returned by customers were purchased by petitioners for resale in the same form in which received and canceled the assessments of use taxes (R. 13, 29, 44, 54, 72, 109). The Court of Appeals reversed (R. 115), holding that the purpose was to use the bottles and cases in the conduct of their businesses; not to resell them (R. 111).

SUMMARY OF ARGUMENT

The statute involved is limited in its operation to the District of Columbia, and therefore this Court should not grant the petition for writ of certiorari.

Petitioners' petition and brief have not been prepared in accordance with the rules of this Court, which is sufficient reason for denying the petition.

None of the questions presented or reasons relied on for allowance of the petition is included among the conditions under which this Court grants petitions for writ of certiorari.

The United States Court of Appeals for the District of Columbia Circuit, in construing the statute, gave extremely careful consideration to the matter and was clearly correct in holding that petitioners used the property purchased in the conduct of their businesses, that such was the dominant purpose when the property was purchased, and that, therefore, the assessments for the use of such property were valid.

The third question presented, relating to alleged dual taxation, was not raised below and is not discussed in petitioners' brief. Therefore, the matter is not discussed in this brief.

ARGUMENT

I

The Petition should be denied.

The statute involved is limited in its operation to the District of Columbia. This Court has stated that it will not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon statutes limited in their operation to the District of Columbia. *District of Columbia* v. *Pace*, 320 U. S. 698, 702; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285; *Cf. Fisher* v. *United States*, 328 U. S. 463, 476.[3]

Petitioners' petition and brief, with exception of "Opinions Below", do not contain references to the record page number as required by Rule 27, par. 3, of the Rules of this Court and the grounds upon which it is contended that this

[3] This Court recently denied a petition for certiorari in *John McShain, Inc.* v. *District of Columbia*, 346 U. S. 900, which involved the same statute.

Court has jurisdiction have not been stated as pointed out above, either one of which constitutes sufficient reason for denying the petition under Rule 38, par. 2, and *General Talking Pictures Corp. v. Western Electric Co.* 304 U. S. 175, 178.

Petitioners have stated three questions presented and five reasons relied on for allowance of the writ of certiorari (Pet., p. 5, 6), none of which falls within the ambit of conditions prescribed in Sec. 1257(3), Title 28, United States Code, or Rule 38, par. 5, of the Rules of this Court for granting a petition for writ of certiorari.

The first question stated is whether the Court of Appeals construed the unambiguous local statute to make taxable that which was not taxable. As to this petitioners argue (Brief, p. 11) that if the Court below considered the statute ambiguous, the doubt should have been resolved in favor of the petitioners. A careful reading of the Court's opinion (R. 105-116) does not disclose that the Court considered the statute ambiguous. The opinion shows that the Court gave extremely careful consideration to the matter and, in construing the statute, gave a proper and reasonable construction of such statute. The statute imposes the tax on the "use, storage, or consumption" of the property purchased but, under the definition of "retail sale" excludes "those in which the purpose of the purchaser is to resell the property so transferred in the form in which the same is, or is to be, received". The Court said as to this (R. 111):

> "• • • But the exclusionary provisions of § 47-2701.1(a) surely were not intended to apply merely because as between respondents and their customers a sale of the containers occurs. Use of them by respondents also occurs; and assuming that following such use a sale is made it is not one which

necessarily relieves of the use tax. * * * We must keep in mind that the statute does not provide that the tax shall not apply whenever there is a resale; it is only when the purpose of the purchase is to resell. The true purpose here is not to resell but to use, even if this use is made possible in part through the form of resale and repurchase."

In a concurring opinion Circuit Judge Prettyman said (R. 115):

"* * * I agree with the majority that the cases and bottles were purchased by petitioners for use in their respective businesses and the purchases were therefore subject to the use tax * * *."

The second question stated is whether the Court of Appeals properly determined the "purpose" of petitioners in acquiring the bottles and wooden cases. Of course, as shown by the statutory definition of "retail sale", *supra*, if the purpose of petitioners when purchasing such property was to resell it in the form in which received, such as, for example, a pair of shoes, the tax would not apply. This was the only question in the Court below (R. 106). As to this the Court stated (R. 111):

"* * * The purpose was to use them, not to resell them. Respondents are not in the business of selling bottles or cases but of using them as a means of marketing their soft drinks. * * * It is to use and reuse them. Respondents do not purchase a wooden case for 83 cents and 24 empty bottles for 4 cents each, making a total of $1.79, to resell for $1.30 after filling them with their soft drink products."

"[R. 112] * * * We conclude that respondents' dominant purpose in acquiring the bottles and cases was not to resell them but to secure their availability for recurring use in marketing their

products and accordingly that the assessments for the use of the bottles and cases were valid."

Petitioners' argument on this question appears to be only that the decision of the Court of Appeals in this case, while in accord with a prior decision concerning the statute here involved as well as decisions in the States of Florida and California, is in conflict with decisions made by certain tribunals in other States, particularly the State of Tennessee. The first reason given for allowance of the writ here sought (Pet., p. 5) is that "The decision of the Court below is in conflict with a decision of the highest state court of Tennessee on the interpretation of similar statutes." It has not been thought heretofore that this was one of the compelling reasons why this Court ought to grant a writ of certiorari, or that the laws and decisions of courts in Tennessee (or any other State) are paramount to laws enacted by the Congress of the United States, legislating for the District of Columbia, and decisions of the United States Court of Appeals for the District of Columbia Circuit. Since *Loughborough* v. *Blake*, 5 Wheat. (18 U. S.) 317, 5 L. Ed. 98 (1820), it has not been doubted that Congress has power to levy taxes for District purposes only. *Gibbons* v. *District of Columbia*, 116 U. S. 404, 29 L. Ed. 680; *Neild et al.* v. *District of Columbia*, 71 App. D. C. 306, 110 F. 2d 246.

The third question stated is whether the Court below has created a precedent for dual taxation. We do not attempt to answer this because there is no evidence on the matter, the question was not raised in the Courts below, and the question is not discussed in petitioners' brief filed in this Court. *Tyrrell* v. *District of Columbia*, 243 U. S. 1, 5; *Hormel* v. *Helvering*, 312 U. S. 552, 556; *National Bank of Washington, et al.* v. *District of Columbia*, 85 U. S. App. D. C. 187, 176 F. 2d 62.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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